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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MISAEL EDUARDO BARBA-REJON, Defendant and Appellant.	A115165 (Contra Costa County Super. Ct. No. 05-051827-4)

Misael Eduardo Barba-Rejon appeals from a judgment upon a jury verdict finding him guilty of three counts of vehicular manslaughter while intoxicated, without gross negligence (Pen. Code, § 192, subd. (c)(3)[1] (counts one to three)). The jury also found defendant guilty of driving under the influence causing injury (Veh. Code, § 23153, subd. (a) (count four)) and driving with a .08 percent blood alcohol causing injury (*id.*, subd. (b) (count five)), and that in committing counts four and five he personally inflicted great bodily injury within the meaning of Penal Code[2] section 12022.7, subdivision (a). Defendant contends that the trial court erred in failing to instruct sua sponte regarding the elements of the great bodily injury enhancement, and that the abstract of judgment incorrectly reflects his convictions on counts one to three. We direct the trial court to modify the abstract of judgment to indicate the correct offenses of which defendant was convicted and otherwise affirm the judgment.

[1] Defendant was convicted under Penal Code former section 192, subdivision (c)(3) (Stats. 1998, ch. 278, § 1, No. 5, West's Cal. Legis. Service); all references are to former section 192.

[2] All further statutory references are to the Penal Code.

I. FACTS

At approximately 8:30 p.m. on April 15, 2005, Michael Kelly was driving on Highway 4 traveling eastbound on the Willow Pass grade between Concord and Pittsburg. Kelly was in the fast lane when he noticed a vehicle coming up behind him going at about 75 to 80 miles per hour, flashing its high beams. Kelly changed lanes and he saw that the vehicle speeding in the left lane was a red Dodge Durango. The Durango proceeded to swerve in and out of traffic and to tailgate for approximately a quarter mile. The traffic then slowed as the lanes merged from four lanes to two lanes just before the Loveridge Road exit.

Anthony Bastian was driving on Highway 4 towards Oakley when a red Durango passed him going approximately 80-90 miles per hour just before the overpass for Oakley Road. The Durango took the Oakley exit continuing on Highway 4 and turned right at a red light without stopping. When Bastian reached the stoplight at Neroly Road and Highway 4, he heard the sound of a collision up ahead. He saw the Durango upside down and observed another car severed in half.

Maria Betancur was leaving a Quinceañera rehearsal party at the Red Man Pocahontas Hall in Oakley at approximately 8:45 p.m. She saw Blanca Nieves, Victor Gonzalez, Jr., William Narez, and Gerardo Lepe leave the hall and get into a Honda Accord. The Honda was parked adjacent to the curb in front of the hall. Lepe drove the Honda away from the curb and started to move forward. Betancur approached her car and looked back at Lepe's car and noticed that there were headlights in the distance indicating a car was approaching toward Brentwood. She saw Lepe look over his left shoulder. He drove forward a slight distance before he started to turn toward the left lanes. Betancur looked back a second time and noticed that a car approaching the Honda was too close. At this point, the Honda was approximately halfway between the No. 1 lane and the turning lane. The Honda appeared to be approaching the turning lane to make a U-turn. The Durango hit the Honda's side between the middle of its two doors splitting it in half.

Deputy Sheriff Robert Roberts responded to the scene. He observed that the Durango was upside down on its hood in the No. 1 lane. Roberts heard screams and went to the Honda where he found two people inside who had no pulse. He called for assistance. Roberts found another man outside the Honda who was lying in a pool of blood. The Durango then caught fire. Defendant, who appeared to be dazed, was standing on the right shoulder of the road.

After the paramedics arrived, Roberts saw another victim lying on the side of the road. This female victim had no pulse.

Deputy Sheriff Jeffrey Gallegos also responded to the scene. Gallegos spoke with defendant who was very disoriented and confused. Defendant acknowledged that he was involved in the accident and said that he was not injured. Gallegos did not conduct any field sobriety tests of defendant because he opined that defendant's disorientation was a result of being in the accident. When Gallegos asked defendant what happened, defendant said, " 'The car pulled out in front of me.' " Gallegos did not suspect that defendant was under the influence and assumed any confusion or disorientation was a result of the severe accident.

Deputy Sheriff Steve Borbely, the traffic investigations officer for Oakley, responded to the scene. He testified that the posted speed limit on Highway 4 is 45 miles per hour. He investigated the scene for physical evidence. He found no alcohol containers. There were no skid marks in the area of the collision. He, however, noticed skid marks in the gravel area where the Honda had been parked. Borbely testified that it was unlawful and unsafe to make a U-turn by turning from the curb across the No. 1 and No. 2 lanes of eastbound traffic and into the No. 1 westbound lane. He estimated that from the curb where the Honda was parked, the Durango's headlights would be visible from 1,204 feet away but would be obscured for about 317 feet where there is a dip in the road and would be again visible from a distance of approximately 887 feet. Borbely acknowledged that the Vehicle Code states that a minimum safe distance of an unobstructed view in which to make a U-turn is 200 feet. Based on his knowledge,

training, and investigation of the accident, he opined that defendant may not have applied the brakes long enough to have an effect on the Durango's speed.

Paramedics transferred defendant and Narez, the survivor from the Honda, to hospitals. Brandy Decker, who started defendant on a saline solution intravenously, detected an odor of alcohol from him as she was loading him in the ambulance. Defendant answered Decker's questions coherently and seemed sober. He denied that he was under the influence.

Deputy Sheriff Ian Jones interviewed defendant in the emergency room of Sutter Delta Hospital. Defendant told him about the accident and his injuries. At approximately 12:50 a.m., defendant's blood was drawn. Defendant did not appear to be intoxicated.

Narez testified that he could not remember the accident. He spent two months in the hospital and had four or five surgeries. The accident left him with numerous scars on his back, chest, and abdomen, and a scar on his throat from a tracheotomy. He also lost part of his lung and continues to have problems with his breathing. In addition, he suffered a brain aneurysm and broken ribs. He was 15 years old at the time of the accident.

Stephanie Williams, a forensic toxicologist, testified that defendant's blood alcohol concentration was .06 percent. Using an average alcohol elimination rate of .015 percent per hour, and assuming that defendant did not drink any alcohol after the accident, Williams estimated that defendant's blood alcohol level four hours earlier at 8:50 p.m. was .12 percent. Williams opined that a person with a .12 blood alcohol level was under the influence of alcohol for the purposes of operating a motor vehicle safely. She further testified that blood alcohol elimination rates range from .01 to .02 and that even if defendant was at the lower elimination rate of .01, his blood alcohol level at the time of the accident would have been .10 and he would be under the influence of alcohol and unable to operate a motor vehicle safely. Williams also tested Lepe's blood sample and found no evidence of alcohol in his blood.

Deputy Sheriff David Heinbaugh was called to the scene and investigated the accident. In examining the accident scene, he determined that the Durango had been in

the No. 1 lane while the Honda had travelled across the lanes perpendicular to the Durango's path. He concluded that the Durango's front license plate hit the Honda between its two driver's side doors. At the point of impact, the Honda's chassis failed, causing the two side doors to overlap.

Heinbaugh also opined that from the crash site, there was an unobstructed view of headlights from a distance of 800 feet. He estimated that it would take approximately eight seconds for someone travelling at 60 miles per hour, six and a half seconds for someone driving at 70 miles an hour, and five seconds if the speed was 80 miles per hour to travel 800 feet. He also testified that it is possible defendant could have applied the brakes without leaving any skid marks. Finally, Heinbaugh opined that the Honda made an unsafe and illegal U-turn.

Rudy Degger, an accident reconstruction specialist, relied on Heinbaugh's data and determined that the Durango's speed was "no less than 70 miles per hour."

II. DISCUSSION

Defendant contends that the trial court erred in failing to instruct sua sponte on CALCRIM No. 3160 regarding the elements of the great bodily injury enhancement alleged in counts four and five. We conclude that the trial court erred in failing to so instruct but that the omission was harmless.

Defendant was charged in counts four and five with an enhancement under section 12022.7, subdivision (a) alleging personal infliction of great bodily injury on Narez. The court failed to instruct on the enhancement. Instead, the only reference to the enhancements was contained on the verdict forms for counts four and five. On the forms, the jury was instructed to make a finding on the enhancement if it found defendant to be guilty of the charged counts.[3]

[3] The following was set forth on the verdict forms for counts four and five: "INSTRUCTION TO THE JURY: USE THE FOLLOWING FINDING **ONLY** IF THE JURY HAS FOUND THE DEFENDANT TO BE **'GUILTY'** OF THE ABOVE OFFENSE [¶] We, the Jury find the further allegations pursuant to Penal Code section 12022.7(a), that in the commission and attempted commission of the above offense, that the Defendant, MISAEL EDUARDO BARBA-REJON, personally inflicted great bodily

It is well settled that the trial court is required to instruct on the elements of a sentence enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490) "Except for sentence enhancement provisions that are based on a defendant's prior conviction, the federal Constitution requires a jury to find, beyond a reasonable doubt, the existence of every element of a sentence enhancement that increases the penalty for a crime beyond the 'prescribed statutory maximum' punishment for that crime. ([*Ibid.*]) Therefore, a trial court's failure to instruct the jury on an element of a sentence enhancement provision (other than one based on a prior conviction), is federal constitutional error if the provision 'increases the penalty for [the underlying] crime beyond the prescribed statutory maximum.' (*Ibid.*) Such error is reversible under *Chapman*[*v. California* (1967)] 386 U.S. [18,] 24 . . . , unless it can be shown 'beyond a reasonable doubt' that the error did not contribute to the jury's verdict." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.)

Here, the court failed to give CALCRIM No. 3160 on the elements of the great bodily injury enhancement.[4] The Attorney General argues that the court's instruction pertaining to the enhancement on the verdict form was sufficient. While this instruction alerted the jury to the requirement that it make a separate finding on the enhancement as

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injury upon William Narez, who was not an accomplice in the above offense to be _____."
TRUE/NOT TRUE

[4] CALCRIM No. 3160 states in pertinent part: "If you find the defendant guilty of the crime[s] charged in Count[s] ___[,] . . . you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant personally inflicted great bodily injury on _____<*insert name of injured person*> during the commission . . . of that crime. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.] [¶] . . . [¶] *Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm. [¶] . . . [¶] The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved."

to each count, it failed to define great bodily injury, an element of the enhancement.[5] The error, however, was harmless under the *Chapman* standard.

Defendant argues that the instructional error was prejudicial because the jury was not instructed that direct causation and not simply proximate causation, was required to support the great bodily injury findings. He relies on *People v. Rodriguez* (1999) 69 Cal.App.4th 341, 349-350. There, the court reversed a second strike allegation because the jury was erroneously instructed it could find that the defendant personally inflicted great bodily injury if it found proximate causation rather than requiring the jury to find personal infliction. (*Id.* at pp. 347-348.) The *Rodriguez* court did not give a CALJIC instruction on personal infliction of great bodily injury but rather gave an instruction drafted by the prosecutor that erroneously incorporated a definition of proximate cause. (*Rodriguez*, at pp. 346-347.) Division Two of the First Appellate District determined that the instruction was incorrect. "To 'personally inflict' an injury is to directly cause an injury not just to proximately cause it. The instruction was wrong because it allowed the jury to find against Rodriguez if the officer's injury was a 'direct, natural and probable consequence' of Rodriguez's action, even if Rodriguez did not personally inflict the injury." (*Id.* at pp. 347-348.)

Here, however, the jury was not instructed on proximate causation in connection with the finding on the enhancement. Rather, the only instruction given to the jury on the enhancement asked it to make a finding on whether defendant "personally inflicted great bodily injury upon William Narez . . . ." Contrary to defendant's argument, the court was not required to sua sponte instruct on the meaning of personal infliction. As the Supreme Court explained in *People v. Cole* (1982) 31 Cal.3d 568, 572, the Legislature could not have been clearer in the language of section 12022.7: "[T]he enhancement applies only to a person who himself inflicts the injury." Moreover, defendant did not request any clarification of the term or an instruction on the definition at trial. "In the absence of a specific request, a court is not required to instruct the jury with respect to words or

[5] The court had defined great bodily injury in connection with its instructions on vehicular manslaughter.

phrases that are commonly understood and not used in a technical or legal sense." (*People v. Navarette* (2003) 30 Cal.4th 458, 503.)

Relying on *People v. Guzman* (2000) 77 Cal.App.4th 761, 764, defendant also contends that the jury's finding on the section 12022.7, subdivision (a) enhancement cannot be upheld because Lepe directly caused the injury by making an illegal and unsafe U-turn. In *Guzman*, the defendant was convicted of driving under the influence of alcohol and causing great bodily injury to another person as a result of an automobile collision in which he made an unsafe left turn in front of another vehicle. (*Guzman*, at pp. 762-763.) Like defendant here, the defendant in *Guzman* also argued that he did not personally inflict great bodily injury on the victim of the accident because the other driver involved in the accident was the one who directly performed the act that caused the injury. (*Id.* at p. 764.) The court rejected the argument, explaining that "when 'personally' is included in an enhancement statute, direct rather than derivative culpability is a precondition to increasing a sentence" and, hence, the defendant must directly cause the injury, not simply proximately cause it. (*Ibid.*) The court determined that the fact another vehicle was involved in the collision did not absolve the defendant of culpability for directly causing the injury. "More than one person may be found to have directly participated in inflicting a single injury. . . . Thus, the fact that the collision involved two vehicles does not absolve appellant of direct responsibility for [the victim's] injuries." (*Ibid.*)

Here, as in *Guzman*, the jury's findings on the section 12022.7 enhancements were proper based on defendant's direct participation in causing the accident. He not only was driving under the influence of alcohol but was driving in excess of the speed limit. Defendant was not absolved of culpability simply because Lepe's actions may have contributed to the accident. In any event, in finding defendant guilty of counts four and five, the jury necessarily rejected the defense that Lepe caused the accident.

In sum, while the court erred in failing to give CALCRIM No. 3160, the court's written instruction on the verdict forms together with the instructions as a whole

adequately informed the jury of the relevant legal principles of the case. We, therefore, uphold the jury's findings on the enhancements.[6]

Defendant also contends that the abstract of judgment should be modified to reflect that he was convicted of vehicular manslaughter while intoxicated but without gross negligence under section 192, subdivision (c)(3), not gross vehicular manslaughter while intoxicated (§ 191.5, subd. (a)). Defendant is correct, and the Attorney General concedes the error. We will direct that the abstract of judgment be modified accordingly.

III. DISPOSITION

The trial court is directed to prepare a modified abstract of judgment reflecting that defendant was convicted in counts one through three of vehicular manslaughter while intoxicated without gross negligence in violation of section 192, subdivision (c)(3), and to forward an amended abstract of judgment to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

_____
RIVERA, J.

We concur:

_____
RUVOLO, P.J.

_____
REARDON, J.

[6] That the jury did not find defendant guilty of vehicular manslaughter with gross negligence is not determinative of whether the jury would have also rejected the section 12022.7 enhancements. To make a true finding on the enhancements, the jury was required to find only that defendant personally inflicted great bodily injury on Narez—that he was a direct cause of the injury.